No. 09-401

NOV 4 - 2009

In The
Supreme Court of the United States

GEOFFREY N. FIEGER,

Petitioner,

v.

SUPREME COURT OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court deny the petition for writ of certiorari when the questions presented in the petition were not raised in the South Carolina Supreme Court, and the South Carolina Supreme Court did not decide an important federal question when it withdrew permission for Petitioner to appear *pro hac vice* on the basis that Petitioner provided false information on his verified application and committed misconduct in other jurisdictions?

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JURISDICTION

The petition for writ of certiorari should be denied for lack of jurisdiction because Petitioner did not raise the federal questions presented in the petition in the South Carolina Supreme Court. *See* 28 U.S.C. § 1257(a) (2006) (permitting review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right . . . is *specially set up or claimed under the Constitution* or the treaties or statutes of . . . the United States") (emphasis added); *Howell v. Mississippi*, 543 U.S. 440, 455–56 (2005) (recognizing the long line of cases holding that the failure to present a federal claim in state court is jurisdictional but declining to decide whether such a failure is jurisdictional or prudential).

The South Carolina Supreme Court does not contest the timeliness of the petition for writ of certiorari seeking review of the order dated July 23, 2009. In the event that the petition seeks review of prior orders of the South Carolina Supreme Court, the petition is late. *See* 28 U.S.C. § 2101(c) (2006) (providing that a writ of certiorari shall be filed within ninety days after the entry of the judgment sought to be reviewed); Sup. Ct. R. 13.1 (same).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257(a) (2006):

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

Petitioner Geoffrey N. Fieger seeks review of the South Carolina Supreme Court's order dated July 23, 2009, withdrawing permission for Petitioner to appear *pro hac vice* in the courts of South Carolina. The order states in part as follows:

> Based on the fact that [Petitioner] provided false information on his Verified Application for Admission Pro Hac Vice in *Sheikh v. Lexington Medical Center*, 03-CP-32-0675, which he signed, under oath, on April 22, 2003, and filed with this Court and the lower court, and [Petitioner's] established misconduct in other jurisdictions, including threatening witnesses, excessively and disruptively arguing with a trial judge's ruling, and repeatedly submitting false information on pro hac vice applications, we hereby withdraw permission for [Petitioner] to appear pro hac vice in this State. Rule 404(e), SCACR. [Petitioner's] Motion to Remove Suspension to Appear Pro Hac Vice is therefore denied as moot.

(App. 1–3.)

Petitioner did not seek rehearing of this decision, nor did he request a hearing in the motion giving rise to the decision.

Petitioner is an attorney licensed to practice law in Michigan. He was granted permission to appear *pro hac vice* in a medical malpractice case pending in South Carolina.[1] Petitioner obtained a $30 million verdict for his client, but after the verdict, the trial judge granted a new trial absolute.

Following the verdict, but before the new trial began, the South Carolina Supreme Court initially revoked (App. 16) and later suspended (App. 14) Petitioner's permission to appear *pro hac vice* in South Carolina. The court suspended permission after notice that Petitioner had been indicted by a grand jury in the Eastern District of Michigan on charges of conspiracy, illegal contributions, false statements, obstruction of justice, and causing an

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[1] There are two orders regarding Petitioner's motion to appear *pro hac vice* in the medical malpractice case pending in South Carolina. Petitioner has included only the first order in the appendix. The first order is dated July 21, 2003, and grants Petitioner permission to appear based simply on the motion and affidavit in support. (App. 20–21.) The second order is dated April 28, 2004, and grants Petitioner permission to appear over the objection of the defendants in the trial court matter and "so long as Suggs & Kelly continue to serve as local counsel." In granting the motion, the trial court stated that it had "reservations" about doing so, but was ultimately persuaded by "(1) the defendants' acknowledgement of the high esteem that local counsel enjoys in the legal community; (2) the court's recognition of the fundamental right of a party to have an attorney of her choice; and, (3) reliance upon Rule 404(c)(9), which requires attorneys seeking admission *pro hac vice* to affirm that they will comply with statutes, law, and procedural rules of this State; be familiar with and comply with the South Carolina Rules of Professional Conduct; and submit to the jurisdiction of the courts of this State and the South Carolina disciplinary process." Again, this second order does not appear in the appendix.

offense, all in violation of various provisions of the United States Code. During the suspension period, Petitioner filed multiple motions and petitions in the South Carolina Supreme Court, all of which were accepted, considered, and ruled upon by the court.

The first motion Petitioner filed was a motion to reconsider the South Carolina Supreme Court's order dated September 28, 2007, revoking permission to practice *pro hac vice* on the basis that Petitioner had been indicted for a serious crime. Petitioner contended, among other things, that to punish him and his client, "without notice, without an opportunity to be heard and without a scintilla of evidence that [he] committed any crime or violated any rule of conduct of the court violates [the presumption of innocence], as well as due process of law." Petitioner also contended that the court's order "significantly damages fundamental constitutional protections." The motion included 270 pages of exhibits and was later supplemented with additional exhibits.

After considering the materials presented, the South Carolina Supreme Court denied the motion in an order dated December 11, 2007. (App. 12–15.) The court ruled that Petitioner did not have a federal constitutional or statutory right to be admitted *pro hac vice*, and that, in any event, Petitioner received notice of the petition for withdrawal of permission to appear *pro hac vice* and had an opportunity to respond to the petition, which he did. The court modified its order dated September 28, 2007, to suspend (rather than revoke) Petitioner's permission to appear *pro hac vice* until

further order. Petitioner did not seek rehearing or reconsideration of this decision.

After a jury in Michigan acquitted Petitioner of all charges in the indictment, Petitioner filed a petition to remove the suspension. Petitioner contended that the sole basis of the suspension was the pending indictment, and, because he had been found not-guilty on all counts, the suspension should be removed.

The petition to remove suspension was met with opposition. A defendant in the trial court matter in which Petitioner appeared *pro hac vice* requested permission to respond to the petition to remove the suspension. Petitioner filed a petition to deny the defendant's request.

Later, after the defendant filed a return, Petitioner filed a petition to strike the return. Petitioner contended that the defendant did not have standing to intervene, that disciplinary proceedings had not been commenced against him, and that even if they had, the defendant was not a party to those proceedings. He contended that "[t]here are strict procedural rules regarding disciplinary matters that preclude any disciplinary proceedings without providing the accused lawyer with notice and an opportunity to be heard." He also contended that the defendant's request to intervene was "abhorrent to due process" and violated his due process rights. The defendant filed a reply brief.

On August 26, 2008, the South Carolina Supreme Court granted Petitioner's request to strike the defendant's return. (App. 9–11.) The court construed the defendant's return as a lawyer disciplinary complaint and remanded it to the Office of Disciplinary Counsel for consideration. The court held the petition to remove suspension in abeyance pending the resolution of the complaint.

Petitioner moved for reconsideration of the court's decision holding the petition to remove suspension in abeyance pending the resolution of the complaint. Petitioner contended that the allegations in the complaint, "many of which were brought forth in an earlier objection to [his] pro hac vice admission, unfairly create due process concerns for Petitioner as well as [his client]." The South Carolina Supreme Court denied the motion in an order dated October 23, 2008. (App. 8.)

Petitioner filed a second motion to reconsider. Petitioner argued that his continued suspension while the Office of Disciplinary Counsel considered the complaint was "arbitrary and capricious" and violated his "federally secured constitutional rights under the Due Process Clause of the Fourteenth Amendment." He also argued that the continued suspension denied his clients "their right to retained counsel." The South Carolina Supreme Court denied the motion in an order dated May 21, 2009. (App. 6–7.)

Finally, after the South Carolina Commission on Lawyer Conduct dismissed the lawyer disciplinary complaint under investigation by the Office of Disciplinary Counsel, Petitioner filed a motion to remove the suspension. The sole argument presented in the motion was that the suspension should be lifted because the complaint had been dismissed. Petitioner did not make any constitutional due process arguments on behalf of himself or his client, nor did he request a hearing.

It was after this seventh and final motion was filed that the South Carolina Supreme Court withdrew permission for Petitioner to appear *pro hac vice* in the courts of South Carolina. In an order dated July 23, 2009, the court found that Petitioner provided false information on his verified application and committed misconduct in other jurisdictions, thereby rendering the motion to remove suspension moot. (App. 1–3.)

Petitioner did not seek rehearing or request an opportunity to refute the court's findings. Petitioner did not argue that the withdrawal of permission to appear *pro hac vice* violated his or his client's constitutional rights. Instead, Petitioner filed a petition for writ of certiorari in this Court.

ARGUMENT

This Court should deny the petition for writ of certiorari because the questions presented in the petition were not raised in the South Carolina Supreme Court, and the South Carolina Supreme Court did not decide an important federal question when it withdrew permission for Petitioner to appear *pro hac vice* on the basis that Petitioner provided false information on his verified application and committed misconduct in other jurisdictions.

The constitutional questions presented in the petition for writ of certiorari have never been raised in the South Carolina Supreme Court, nor has the South Carolina Supreme Court decided an important federal question. For these reasons, the petition for writ of certiorari should be denied.

A. Petitioner did not raise the questions presented here in the South Carolina Supreme Court.

The petition for writ of certiorari marks the first time that Petitioner has challenged the July 23, 2009 order revoking permission for him to appear *pro hac vice* in South Carolina. He has never before challenged the order or raised the constitutional questions that he raises here.

By failing to raise the federal questions presented here to the South Carolina Supreme Court, Petitioner has overlooked a longstanding principle in this Court, which is that "this Court has

almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision [the Court has] been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997)). This principle stems from 28 U.S.C. § 1257(a) (2006), which gives this Court the power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right . . . is *specially set up or claimed under the Constitution* or the treaties or statutes of . . . the United States." (Emphasis added.)

The rule requiring federal claims to be addressed or properly presented in state courts "serves an important interest of comity." *Adams*, 520 U.S. at 90. As this Court has explained, "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Id.* (quoting *Webb v. Webb*, 451 U.S. 493, 500 (1981)). "Thus, the rule affords state courts 'an opportunity to consider the constitutionality of the actions of a state official, and, equally important, proposed changes' that could obviate any challenges to state action in the federal court." *Adams*, 520 U.S. at 90 (quoting *Illinois v. Gates*, 462 U.S. 213, 221–22 (1983)).

The rule also serves a practical purpose. "Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by

allowing state courts to resolve issues on state-law grounds, but also assists [this Court] in [its] deliberations by promoting the creation of an adequate factual and legal record." *Adams*, 520 U.S. at 90–91.

In the case at hand, the petition for writ of certiorari should be denied because the federal law challenges to the South Carolina Supreme Court's order withdrawing permission for Petitioner to appear *pro hac vice* were not presented in the South Carolina Supreme Court. The South Carolina Supreme Court never had the occasion to consider the questions that Petitioner has presented here.

Petitioner made one argument in the motion giving rise to the court's withdrawal of his permission to appear *pro hac vice*. Petitioner argued that the suspension should be removed because the South Carolina Commission on Lawyer Conduct voted to dismiss the lawyer disciplinary complaint pending against him. That is it.

Petitioner did not request a hearing. He did not state that he had a constitutional right to a hearing before further discipline. He did not state that his client had a constitutional right to counsel of her choice. He did not raise any federal questions in the South Carolina Supreme Court.

In addition to failing to raise federal questions before the South Carolina Supreme Court rendered its decision, Petitioner failed to raise federal questions afterwards. He did not petition for rehearing. He did not move for reconsideration. He

did not tell the court that the order violated his due process rights. He did not tell the court that the order violated his client's due process rights. He did not demand to be heard so that he could refute the court's findings.

Instead, he came directly to this Court, raising constitutional due process claims that were never presented in the South Carolina Supreme Court. In doing so, Petitioner failed to exhaust the procedural remedies available to him and failed to give the South Carolina Supreme Court the opportunity to rule on the questions presented here. *See* Rule 221, SCACR (South Carolina Appellate Court Rules) (permitting petitions for rehearing); Rule 27(f), RLDE (Rules for Lawyer Disciplinary Enforcement), Rule 413, SCACR (same). *Cf. O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (explaining that "the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts . . . .").

Although Petitioner has made due process arguments in the past, those arguments are not the same as the ones presented here and were not decided in the order sought to be reviewed. First, Petitioner previously contended that the South Carolina Supreme Court violated due process when it revoked permission for him to appear *pro hac vice* after receiving notice that he had been indicted for a serious crime.

The South Carolina Supreme Court considered Petitioner's due process argument and

found that the state court rules permitted suspension upon notice that a lawyer has been indicted for a serious crime. *See* Rule 17(a), RLDE, Rule 413, SCACR (providing that "the Supreme Court may place a lawyer on interim suspension upon notice of the filing of an indictment, information or complaint charging the lawyer with a serious crime"). In any event, the court found that Petitioner received notice and an opportunity to be heard before the court rendered its decision. The court also modified its order to state that permission to appear *pro hac vice* had been suspended rather than revoked.

Second, Petitioner argued that his continued suspension while the lawyer disciplinary complaint was under investigation by the Office of Disciplinary Counsel violated his due process rights. This is a different argument than the one raised here. Here, Petitioner contends that he is entitled to notice and an opportunity to be heard before permission to appear *pro hac vice* is withdrawn. There, Petitioner argued that continued suspension during an investigation violated due process. Nonetheless, the South Carolina Supreme Court considered and rejected Petitioner's argument, and Petitioner did not seek review of that ruling.

Petitioner filed multiple motions and petitions in the South Carolina Supreme Court. All motions and petitions were accepted and ruled upon by the court. Petitioner routinely asked the court to reconsider its rulings, and his pleas for reconsideration were heard.

The final straw in this storied disciplinary case came when the South Carolina Supreme Court determined that Petitioner provided false information on his verified application for admission *pro hac vice*. The court's order and the basis for the decision should not have come as a surprise. Petitioner has known that his veracity has been under attack since the trial court matter, when the defendants vigorously opposed his admission *pro hac vice* before the trial began. He knew that it was under attack once again in the South Carolina Supreme Court when the defendants in the trial court matter filed a return and reply brief opposing the removal of suspension. He knew it was under attack yet again when the return and reply brief were construed as a lawyer disciplinary complaint and sent to the Office of Disciplinary Counsel for investigation.

Even if Petitioner was surprised by the South Carolina Supreme Court's ruling, he should have communicated that surprise to the South Carolina Supreme Court. There is no reason to conclude that the court would not have given Petitioner whatever process he requested. During the course of his suspension, the court accepted, considered, and ruled upon each and every motion and petition that Petitioner filed, ruling in his favor once (App. 10), and modifying one of its orders as he suggested (App. 14).

Indeed, the South Carolina appellate court rules contemplate process in attorney disciplinary matters. *See* Rule 9, RLDE, Rule 413, SCACR (providing that "the South Carolina Rules of Civil

Procedure apply in lawyer discipline" matters); Rule 17(d), RLDE, Rule 413, SCACR (providing that "[a] lawyer placed on interim suspension . . . may apply to the Supreme Court for reconsideration of the order"); Rule 19(b)(1), RLDE, Rule 413, SCACR (providing that "[d]isciplinary counsel shall request the lawyer to file a response to the allegations in the complaint"); Rule 19(c)(5), RLDE, Rule 413, SCACR (providing that "[b]efore the investigative panel determines its disposition of the complaint, . . . the lawyer may request that the lawyer appear before disciplinary counsel to respond to questions"); Rule 19(d)(3), RLDE, Rule 413, SCACR (providing that a lawyer has a right to object to a notice of confidential admonition); Rule 22, RLDE, Rule 413, SCACR (providing that "formal charges shall give fair and adequate notice of the nature of the alleged misconduct . . . ."); Rule 26, RLDE, Rule 413, SCACR (explaining the hearing process); Rule 27, RLDE, Rule 413, SCACR (explaining the review process by the South Carolina Supreme Court, including the procedure for seeking rehearing).

Petitioner did not use the procedural remedies available to him. Instead, he avoided the process available in the South Carolina Supreme Court and came directly to this Court, seeking answers to questions that were not presented below.

Petitioner's failure to ask the South Carolina Supreme Court the questions presented here is fatal to the relief requested. *See* 28 U.S.C. § 1257(a) (requiring that federal questions be "specially set up or claimed" in the highest court of a state before they are reviewed by the United States Supreme Court);

Howell, 543 U.S. at 455–56 (recognizing the long line of cases holding that the failure to present a federal claim in state court is jurisdictional but declining to decide whether such a failure is jurisdictional or prudential).

The South Carolina Supreme Court did not have occasion to consider the questions raised here. For this reason, the petition for writ of certiorari should be denied.

B. The South Carolina Supreme Court did not decide an important federal question.

In addition to the fact that Petitioner did not raise the questions presented here in the South Carolina Supreme Court, the South Carolina Supreme Court did not decide an important federal question. The court decided only that Petitioner no longer had permission to appear *pro hac vice* in South Carolina based on the fact that he submitted false information on his verified application and committed misconduct in other jurisdictions. The order is silent on the federal questions that Petitioner attempts to raise in this Court.

"When the highest state court is silent on a federal question before [this Court, this Court] assume[s] that the issue was not properly presented . . . ." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). "[T]he aggrieved party bears the burden of defeating this assumption . . . by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here . . . .'"

Id. at 87 (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)).

Petitioner cannot defeat the assumption that the questions presented here were not raised in the South Carolina Supreme Court. There is no evidence that the South Carolina Supreme Court had a fair opportunity to address the federal questions sought to be presented here. Nothing in the court's order indicates that a constitutional question of any kind was decided. The order simply explains the reasons for withdrawal and refers to the court's authority to do so. *See* Rule 404(e), SCACR (amended July 27, 2009) (providing reasons that the court may withdraw permission to appear *pro hac vice*).[2]

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[2] Petitioner suggests that the South Carolina Supreme Court amended the rule "in an attempt to justify, after the fact, the revocation of Petitioner's *pro hac vice* status . . . ." (Pet. 11, n. 1.) But submitting false information on an application to appear *pro hac vice* is conduct that was prohibited under the former version of the rule. The former version of the rule stated that permission may be withdrawn for violations of South Carolina law and the South Carolina Rules of Professional Conduct. Rule 404(e), SCACR. The South Carolina Rules of Professional Conduct plainly provide that lawyers shall not knowingly make false statements. *See, e.g.*, Rule 8.1, South Carolina Rules of Professional Conduct, Rule 407, SCACR (providing that bar applicants and lawyers subject to discipline shall not "knowingly make a false statement of material fact" or "fail to disclose a fact necessary to correct a misapprehension . . . .").

The South Carolina Supreme Court's authority to admit and discipline lawyers stems from state law. *See* S.C. Const. Art. V, § 4 ("The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."); S.C. Code Ann. § 40-5-10 (2001) (recognizing the court's inherent power to regulate the practice of law, including disciplining, suspending, and disbarring lawyers). *See also Leis v. Flynt*, 439 U.S. 438, 442 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States . . . within their respective jurisdictions."). The court does not decide a federal question when it withdraws a lawyer's permission to appear *pro hac vice* in South Carolina.

Because the South Carolina Supreme Court has not decided an important federal question, the court's decision cannot be compared to the federal court decisions cited in the petition for writ of certiorari. In those cases, the courts either decided federal questions or reviewed the merits of the lower court's decision. Here, the state supreme court did not decide a federal question, and Petitioner does not seek review on the merits. Thus, the South Carolina Supreme Court's decision does not conflict with "the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. R. 10(b). Nor does the decision present an important question of federal law "that has not been, but should be, settled by this Court," or "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

Further, the South Carolina Supreme Court has not misconstrued *Leis v. Flynt*, 439 U.S. 438 (1979), as Petitioner contends. (Pet. 16.) The South Carolina Supreme Court does not even mention the *Leis* case in the order sought to be reviewed. The court addressed the *Leis* case in its prior order dated December 11, 2007. The December 11, 2007 order rejected Petitioner's due process argument on the basis that Petitioner received notice and an opportunity to be heard before the decision was rendered. (App. 13.)

Because the order sought to be reviewed here does not decide an important federal question, the petition for writ of certiorari should be denied.

CONCLUSION

There are no compelling reasons to grant the petition for writ of certiorari. Petitioner is an attorney. He filed multiple motions and petitions in the South Carolina Supreme Court during the course of his suspension from practicing law *pro hac vice* in South Carolina, and each and every motion and petition was considered and ruled upon by the court. Given this history, there is no reason to conclude that Petitioner would not have been given a hearing either before or after permission to appear *pro hac vice* was withdrawn, had he requested one. He cannot fail to use the process on the one hand and then argue that process has been denied on the other hand. The petition for writ of certiorari should be denied.

Respectfully submitted,

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